10-29-2015

State v. Svelmoe Respondent's Brief Dckt. 43181

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	No. 43181
Plaintiff-Respondent,	)	
	)	Kootenai Co. Case No.
vs.	)	CR-2014-18684
	)	
TROY MILES SVELMOE,	)	
	)	
Defendant-Appellant.	)	
	)	

BRIEF OF RESPONDENT

APPEAL FROM THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

HONORABLE JOHN T. MITCHELL
District Judge

LAWRENCE G. WASDEN
Attorney General
State of Idaho

PAUL R. PANTHER
Deputy Attorney General
Chief, Criminal Law Division

TED S. TOLLEFSON
Deputy Attorney General
Criminal Law Division
P. O. Box 83720
Boise, Idaho 83720-0010
(208) 334-4534

ATTORNEYS FOR
PLAINTIFF-RESPONDENT

JAY W. LOGSDON
Deputy Public Defender
Kootenai County Public
Defender's Office
400 Northwest Blvd.
P. O. Box 9000
Coeur d'Alene, Idaho 83816
(208) 446-1700

ATTORNEY FOR
DEFENDANT-APPELLANT

IN THE SUPREME COURT OF THE STATE OF IDAHO

COPY

STATE OF IDAHO,	)	
	)	No. 43181
Plaintiff-Respondent,	)	
	)	Kootenai Co. Case No.
vs.	)	CR-2014-18684
	)	
TROY MILES SVELMOE,	)	
	)	
Defendant-Appellant.	)	
	)	

BRIEF OF RESPONDENT

APPEAL FROM THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

HONORABLE JOHN T. MITCHELL
District Judge

LAWRENCE G. WASDEN
Attorney General
State of Idaho

PAUL R. PANTHER
Deputy Attorney General
Chief, Criminal Law Division

TED S. TOLLEFSON
Deputy Attorney General
Criminal Law Division
P. O. Box 83720
Boise, Idaho 83720-0010
(208) 334-4534

ATTORNEYS FOR
PLAINTIFF-RESPONDENT

JAY W. LOGSDON
Deputy Public Defender
Kootenai County Public
Defender's Office
400 Northwest Blvd.
P. O. Box 9000
Coeur d'Alene, Idaho 83816
(208) 446-1700

ATTORNEY FOR
DEFENDANT-APPELLANT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **PAGE**

STATUTES

RULES

STATEMENT OF THE CASE

Nature of the Case

Troy Miles Svelmoe appeals from the judgment entered upon the jury verdict finding him guilty of felony driving under the influence.

Statement of Facts and Course of Proceedings

Officer Chapman stopped Svelmoe because Svelmoe's vehicle bumper exceeded maximum height and his vehicle had no mud flaps. (2/11/15 Tr., p. 24, Ls. 18-25; R., p. 10.) Earlier that same day, Officer Tetrault had responded to a call regarding Svelmoe. (2/11/15 Tr., p. 25, Ls. 12-23; R., pp. 10-11.) At that time, Svelmoe admitted that he had consumed alcohol and Officer Tetrault told Svelmoe not to drive. (Id.) After Officer Chapman stopped Svelmoe, Officer Tetrault was called and conducted the DUI investigation. (2/11/15 Tr., p. 25, Ls. 1-6.) During the DUI investigation Officer Tetrault observed Svelmoe had the odor of an alcohol beverage emitting from his person, bloodshot eyes and a "slack appearance." (2/11/15 Tr., p. 25, Ls. 12-23.)

Officer Tetrault conducted field sobriety tests. (2/11/15 Tr., p. 25, Ls. 24-25.) Svelmoe failed the HGN test and the walk-and-turn test but successfully completed the one-leg stand. (2/11/15 Tr., p. 26, Ls. 2-17.) Officer Tetrault placed Svelmoe under arrest and offered Svelmoe a breath test. (2/11/15 Tr., p. 26, L. 22 – p. 27, L. 5.) Officer Tetrault cleared Svelmoe's mouth of any foreign objects and observed him for fifteen minutes. (2/11/15 Tr., p. 27, Ls. 6-9.) He also read Svelmoe the Administrative License Suspension Advisory (ALS) form. (2/11/15 Tr., p. 27, Ls. 10-15.) Svelmoe indicated he understood the ALS form

and Svelmoe provided two breath samples. (2/11/15 Tr., p. 27, L. 16 – p. 28, L. 7.) Svelmoe never attempted to physically resist the test or revoke his consent. (2/11/15 Tr., p. 28, Ls. 8-14.) The breath samples returned a result of 0.108 and 0.106 BAC. (R., p. 11.)

Because he had two prior DUI convictions, the state charged Svelmoe with felony DUI. (R., pp. 18-19.) At the first preliminary hearing the state did not yet have in its possession the necessary certified documentation to introduce the breath test results. (R., pp. 35-36.[1]) However, the state believed it could establish probable cause without the breath test results and proceeded to preliminary hearing. (Id.) The magistrate found that without the breath test results the state could not establish probable cause and dismissed the case. (Id.)

The state refiled the felony DUI and Svelmoe filed a motion to dismiss claiming that the refiling was "unnecessary and unconstitutional." (R., pp. 28-33.) Svelmoe argued his motion to dismiss at the outset of the second preliminary hearing. (10/31/14 Tr., p. 3, L. 3 – p. 7, L. 14.[2]) The magistrate denied the motion to dismiss, holding in part that it was the district court, not the magistrate, who should rule on the motion. (10/31/14 Tr., p. 7, L. 15 – p. 9, L. 12.)

---

[1] While the first preliminary hearing is referenced in the record (R., pp. 28-33, 35-38, 341-344; 12/19/14 Tr., p. 5, L. 10 – p. 6, L. 11), the transcript, minutes, orders or pleadings actually relating to the first preliminary hearing are not included in the record on appeal.

[2] The October 31, 2014 Transcript is found in the record on pages 250-340.

The state thereafter introduced Svelmoe's breath test results, and the magistrate found probable cause and bound the case over to district court. (10/31/14 Tr., p. 58, L. 3 – p. 64, L. 23, p. 87, L. 7 – p. 88, L. 10; R., pp. 39-49.) In district court, Svelmoe filed a motion to suppress the breath test results, a motion in limine to preclude use of the breath test results, a second motion to dismiss, and a motion for interlocutory appeal to appeal the denial of his first motion to dismiss before the magistrate court. (R., pp. 198-199, 200-214, 225-233, 235-237.) The district court denied Svelmoe's motions. (2/11/15 Tr., p. 46, L. 13 – p. 48, L. 16, Tr., p. 58, L. 5 – p. 59, L. 25, p. 71, L. 12 – p. 72, L. 9; R., pp. 349-350, 385-386.)

At trial the state laid foundation for the breath test results. Officer Tetrault testified that he received DUI-specific training as part of his POST-certification. (2/17/15 Tr., p. 96, L. 21 – p. 97, L. 16.) Officer Tetrault testified that when he took Svelmoe into the jail, after Svelmoe failed the FSTs, he had Svelmoe blow into the Intoxilyzer. (2/17/15 Tr., p. 128, Ls. 1-13.) Officer Tetrault was trained to use the Intoxilyzer machine. (2/17/15 Tr., p. 130, Ls. 13-12.) This training included a written test and a hands-on use of the Intoxilyzer machine. (2/17/15 Tr., p. 130, Ls. 15-19.) Officer Tetrault passed both the hands-on portion and the written test and is qualified to use the Intoxilyzer machine. (2/17/15 Tr., p. 130, L. 20 – p. 131, L. 3.) Officer Tetrault received the operator's certification and it was current on May 9, 2014, when he tested Svelmoe. (2/17/15 Tr., p. 131, L. 15 – p. 133, L. 14.) Officer Tetrault's certifications were admitted into evidence. (Id.; Ex. 2.) Officer Tetrault explained that the Intoxilyzer measures

alcohol levels. (2/17/15 Tr., p. 133, Ls. 17-21.) He also testified that the Intoxilyzer goes through a series of internal checks, calibration checks, temperature checks, and it prints out an indication that it has passed all of the internal checks. (2/17/15 Tr., p. 134, L. 7 – p. 135, L. 18.) It also takes two air blanks to make sure there is no alcohol in the actual tube. (Id.) The Intoxilyzer has to pass all of these internal checks in order to be functioning properly. (Id.) It prints a result of the internal tests. (2/17/15 Tr., p. 136, Ls. 14-22.) The state introduced evidence showing the Intoxilyzer serial number 68-013321 and lot solution number 13803 passed all of its internal tests. (Ex. 4.) The state also introduced evidence that Intoxilyzer serial number 68-013321 and lot solution number 13803 were properly certified and calibrated. (2/17/15 Tr., p. 138, Ls. 12-17; see also Ex. 3.) Officer Tetrault testified that he monitored Svelmoe for fifteen minutes and made sure that Svelmoe did not burp, belch or have any foreign objects in his mouth. (2/17/15 Tr., p. 136, L. 23 – p. 138, L. 11.) Svelmoe's breath test results showed a BAC of .108 and .106. (Ex. 4.) At trial, the district court overruled Svelmoe's objections and admitted the breath test evidence. (2/17/15 Tr., p. 144, L. 13 – p. 146, L. 10, p. 147, Ls. 3-14.)

The jury found Svelmoe guilty. (R., p. 452.) Svelmoe waived a jury for Part II and the district court found that Svelmoe had two prior DUI convictions. (2/17/15 Tr., p. 194, Ls. 2-8, p. 208, L. 14 – p. 209, L. 16.) The district court sentenced Svelmoe to 10 years with two years fixed. (R., pp. 455-456, 461-463.) The district court suspended the sentence and placed Svelmoe on probation. (Id.) Svelmoe timely appealed. (R., pp. 467-471.)

ISSUES

Svelmoe states the issues on appeal as:

> I. Whether the Magistrate Court has the authority to consider whether the state has met the requirements of *Stockwell v. State*, 98 Idaho 797 (1977) when the state refiles a felony charge.
>
> II. Whether the new evidence means additional evidence or requires evidence not known to the state at the time of the original preliminary hearing.
>
> III. Whether the state's refiling of the charge in this matter was barred by *res judicata*.
>
> IV. Whether the Idaho State Police have properly promulgated rules for the administration of breath testing.
>
> V. Whether the Idaho State Police have promulgated rules that ensure accuracy as required by I.C. § 18-8002A and I.C. § 18-8004(4).
>
> VI. Whether *State v. Besaw*, 306 P.3d. 219 (Idaho Ct. App. 2013), is manifestly wrong and should be overruled.
>
> VII. Whether the Administrative License Suspension advisory coerces and invalidates the defendant's consent to providing a breath sample under the Fourth Amendment of the United States Constitution and Article I § 1 of the Idaho Constitution.

(Appellant's brief, p. 4.)

The state rephrases the issues as:

1. Has Svelmoe failed to show the district court erred when it denied his motion to dismiss?

2. Has Svelmoe failed to show the district court erred when it denied his motion in limine to exclude the results of his breath test?

3. Has Svelmoe failed to show the district court erred when it denied his motion to suppress?

ARGUMENT

I.
Svelmoe Has Failed To Show The District Court Erred When It Denied His Motion To Dismiss The Refiled Felony

A. Introduction

Svelmoe argues that the district court erred when it denied his motion to dismiss the refiled complaint. (Appellant's brief, pp. 5-14.) Svelmoe raises several arguments on appeal.[3] He argues the state did not have good cause to refile the felony and therefore, the refiling violated his due process rights.

---

[3] Svelmoe also argues that the magistrate erred when it ruled that it was not the magistrate's "province" to rule on whether the state's refile was done in good faith. (See Appellant's brief, pp. 6-7.) This argument is moot because the district court ruled on Svelmoe's Motion to Dismiss Part II, which contained the same issues as his motion to dismiss before the magistrate. (R., pp. 28-33, 225-234.) On appeal, it is the decision of the district court that the appellate court will review. See e.g. State v. DeWitt, 145 Idaho 709, 711, 184 P.3d 215, 217 (Ct. App. 2008) (On appellate review of a decision rendered by a district court in its intermediate appellate capacity, the appellate court "directly review[s] the district court's decision.") Therefore whether the magistrate erred is moot.

Regardless, the magistrate was correct when it ruled that it was not the magistrate's "province" to rule on Svelmoe's motion to dismiss the refiled Complaint. The district court can delegate to the magistrate "Proceedings for the preliminary examination to determine probable cause, commitment prior to trial or the release on bail of persons charged with criminal offenses." I.C. § 1-2208(3)(d). The magistrate's authority is specifically limited in felony cases. Idaho Criminal Rule 2.2 limits the jurisdiction of magistrates to "The first appearance, the setting of bail, and the preliminary examination on a criminal complaint for a felony to determine probable cause, commitment prior to trial, or the release on bail of persons charged with a felony." I.C.R. 2.2(b)(2). The magistrate has not been assigned the power to dismiss a felony with prejudice. Idaho case law holds that when a magistrate dismisses a felony at a preliminary hearing, the state's remedy is not to appeal, but rather the state's remedy is to refile the felony complaint. See State v. Ruiz, 106 Idaho 336, 337-338, 678 P.2d 1109, 1110-1111 (1984); State v. Diaz, 117 Idaho 392, 393-94, 788 P.2d 207, 208-09 (1990). Svelmoe's argument runs afoul of this case law and authority. The magistrate did not err when it declined to rule on Svelmoe's motion to dismiss.

(Appellant's brief, pp. 7-12.) He also argues that the refiling was barred by *res judicata*. (Appellant's brief, pp. 12-14.)

Svelmoe's arguments are without merit. The district court correctly applied the law to the facts in concluding the state refiled the felony charge in good faith and, as such, the refiling did not violate Svelmoe's due process rights. (2/11/15 Tr., p. 71, L. 12 – p. 72, L. 9.) Nor does *res judicata* bar the state from refiling a felony. On appeal, Svelmoe does not apply any facts to the elements of *res judicata*, nor does he cite any law that would bar the state from refiling a felony under *res judicata*. The district court properly denied his motion to dismiss.

B. Standard Of Review

The granting or denial of a motion to dismiss is reviewed for an abuse of discretion. I.C.R. 48; State v. Dixon, 140 Idaho 301, 304-305, 92 P.3d 551, 554-555 (Ct. App. 2004). The standard of review applicable to constitutional issues such as claimed due process violation is one of deference to factual findings, unless there are clearly erroneous, but free review of whether constitutional requirements have been satisfied in light of the facts found. State v. Davis, 141 Idaho 828, 841, 118 P.3d 160, 173 (Ct. App. 2005); State v. Bromgard, 139 Idaho 375, 380, 79 P.3d 734, 739 (Ct. App. 2003); State v. Smith, 135 Idaho 712, 720, 23 P.3d 786, 794 (Ct. App. 2001).

C. The District Court Did Not Err When It Denied Svelmoe's Motion To Dismiss

1. The Felony Complaint Was Not Refiled For The Purpose Of Harassment, Delay or Forum-Shopping; Therefore The Refiling Did Not Violate Due Process

Idaho Code § 19-3506 provides: "An order for the dismissal of the action, as provided in this chapter, is a bar to any other prosecution for the same offense, if it is a misdemeanor; but it is not a bar if the offense is a felony." The Idaho Supreme Court has stated that dismissal and refiling of charges can violate due process if "done for the purpose of harassment or delay or forum-shopping ...." Stockwell v. State, 98 Idaho 797, 806, 573 P.2d 116, 125 (1977). The Court has clarified the rule in Stockwell, however: "*Stockwell* requires the existence of bad faith to prove a per se due process violation." State v. Bacon, 117 Idaho 679, 684, 791 P.2d 429, 434 (1990). Accord State v. Averett, 142 Idaho 879, 885, 136 P.3d 350, 356 (Ct. App. 2006); Davis, 141 Idaho at 842, 118 P.3d at 174. Thus, to establish a due process violation, "the defendant must show that the preaccusation delay caused substantial prejudice to the defendant's right to a fair trial and that the delay was a deliberate device to gain an advantage over the accused." Davis, 141 Idaho at 842, 118 P.3d at 174 (citing State v. Kruse, 100 Idaho 877, 879, 606 P.2d 981, 983 (1980); State v. Burchard, 123 Idaho 382, 386, 848 P.2d 440, 444 (Ct. App. 1993)). See also, United States v. Marion, 404 U.S. 307, 324 (1971) (defining bad faith, in the context of delay, to mean that the government sought delay "to gain tactical advantage over the accused").

On appeal, Svelmoe argues that the state lacked good cause to refile the felony complaint. (Appellant's brief, pp. 7-12.) Svelmoe argues that the state lacked good cause to refile because the state proceeded with the first preliminary hearing knowing that it would be unable to introduce the breath test evidence at the first preliminary hearing. (Appellant's brief, p. 12.) Svelmoe argues that the state was required to have additional evidence that it did not know about prior to the first preliminary hearing before it could refile the felony. (Appellant's brief p. 12 ("This Court should hold that the additional evidence required by the Court in *Stockwell* and the Due Process Clause is evidence that was unknown to the state and could not have been known through an exercise of due diligence at the time of the original preliminary hearing.").)

Contrary to Svelmoe's assertion, Stockwell does not require the state to have "additional evidence" before refiling a criminal complaint. See Stockwell, 98 Idaho at 803, 573 P.2d at 122 (citing I.C. §§ 19-1717, 19-1303, 19-3506). Svelmoe's argument focuses on the following language from Stockwell:

> While the present statutes do not make dismissal of a prosecution at the preliminary examination stage a bar to further prosecution for the same offense, this Court views critically the practice of 'shopping' among magistrates or the repeated refiling of a charge until a favorable ruling is obtained. **Without the production of additional evidence, or the existence of other good cause to justify a subsequent preliminary examination, such a practice can become a form of harassment which may violate the principle of fundamental due process and equal protection of the law, as announced by the United States Supreme Court. This is not to say that when new evidence becomes available or when the prosecutor believes in good faith that the magistrate committed error, the charge should not be refiled; but absent such circumstance, the continued refiling numerous times of a charge which has been dismissed by a magistrate is not to be desired.** The facts of the instant case do

> not approach such an offensive degree to be violative of fundamental fairness. Accordingly, this Court holds that petitioner is not entitled to a writ of prohibition, for as stated before, under existing statutes, dismissal of a prosecution at a preliminary examination is not a statutory bar to further prosecution for the same offense regardless of the 'judicial title' of the official sitting as examining magistrate.

Id. at 806, 573 P.2d at 125 (quoting Nicodemus v. District Court of Oklahoma County, 473 P.2d 312, 316 (Okla. Cr. 1970)) (emphasis added). Svelmoe argues that this quotation requires the state to discover additional, previously unknown evidence before the state can refile a criminal complaint. (See Appellant's brief p. 12.) However, this language only requires "additional" evidence. Stockwell, 98 Idaho at 803, 573 P.2d at 122. ("Without the production of **additional** evidence, or the existence of other good cause to justify a subsequent preliminary examination...") (emphasis added) The only reference to "new" evidence comes in the context of "refiling numerous times." Id.

> This is not to say that when new evidence becomes available or when the prosecutor believes in good faith that the magistrate committed error, the charge should not be refiled; but absent such circumstance, the continued refiling numerous times of a charge which has been dismissed by a magistrate is not to be desired.

Id. There is no requirement that the additional evidence be entirely new and previously undiscovered. The Stockwell test for finding a good faith basis for a refiling may be satisfied by additional evidence, not just newly discovered evidence.

Further, under Stockwell the state can refile a felony even if it does not have any new or additional evidence. The state can refile a felony when it has a good faith belief that the magistrate erred in the first preliminary hearing. Id.

Unless the refiling of a criminal complaint was done for the purpose of harassment, delay or forum-shopping, it is not a violation of the due process clause. Id. at 806, 573 P.2d at 125. The prosecutor is only required to have a good faith belief that the magistrate erred in the first preliminary hearing before the prosecutor can refile and bring a second criminal complaint. Id. Therefore, contrary to Svelmoe's argument, there is no requirement in Stockwell that the state discover new, previously unknown evidence before it can refile.

The district court correctly found that the state did not refile the charge for an improper purpose, and that Svelmoe's motion to dismiss was not well taken in light of Stockwell and all of the facts. (2/11/15 Tr., p. 71, L. 12 – p. 72, L. 9.) The district court did not err when it denied Svelmoe's motion to dismiss.

2. *Res Judicata* Is Inapplicable And Did Not Bar The State From Refiling The Complaint

Svelmoe argues that the district court should have dismissed the refiled complaint because the doctrine of *res judicata* bars the state from refiling a criminal case. (Appellant's brief, pp. 12-14.) Svelmoe does not cite any cases that have applied *res judicata* to a preliminary hearing. (See id.) Nor does Svelmoe make an argument how his first preliminary hearing meets the three factors for claim preclusion or the five factors for issue preclusion. (See id.) Svelmoe only references the factors then makes the conclusory statement, "In this case, all the elements for issue preclusion are met. Thus, the state was barred from proceeding." (Id.) Svelmoe makes no argument. He simply makes a conclusory statement. Since Svelmoe does not make an argument, he has waived this issue on appeal. State v. Zichko, 129 Idaho 259, 263, 923 P.2d 966,

970 (1996) ("A party waives an issue cited on appeal if either authority or argument is lacking, not just if both are lacking.")

Even if he had presented an argument on appeal, *res judicata* does not bar the state from refiling a criminal complaint following a dismissal after a preliminary hearing. As pointed out by the Idaho Supreme Court, Idaho statutes permit the state to refile a criminal case. See Stockwell, 98 Idaho at 803, 573 P.2d at 122. Svelmoe does not cite any authority that the doctrine of *res judicata* trumps this authority.

Further, Svelmoe cannot meet the elements of *res judicata*. Both types of *res judicata* – claim preclusion and issue preclusion – require a "final judgment" on the merits. See e.g. Pocatello Hosp. LLC v. Quail Ridge Medical Investor, LLC, 157 Idaho 732, 738, 339 P.3d 1136, 1142 (2014). A magistrate's dismissal of a felony after a preliminary hearing is not a "final judgment." See I.C.R. 33(b) (district court enters final judgment of conviction or discharge). *Res judicata* also requires a "full and fair opportunity to litigate," and not just any hearing constitutes a "full and fair opportunity to litigate" for the purposes of *res judicata*. See, e.g., State v. Gusman, 125 Idaho 805, 808-809, 874 P. 2d 1112, 1115-1116 (1994) (BAC hearing did not constitute a full and fair opportunity to litigate). By its very nature, a preliminary hearing is not a hearing in which the parties have a "full and fair opportunity to litigate"; it is only a hearing to determine whether there is probable cause to bind the case over to district court where there can then be a "full and fair opportunity" to litigate the merits at trial.

Because *res judicata* is not a bar to refiling a criminal complaint, Svelmoe has failed to show any error in the denial of his motion.

II.
Svelmoe Failed To Show the District Court Erred When It Denied His Motion In Limine

A. Introduction

Svelmoe argues the district court erred when it denied his motion to exclude the results of his breath test. (Appellant's brief, pp. 14-22.) Svelmoe argues that State v. Besaw, 155 Idaho 134, 306 P.3d 219 (Ct. App. 2013), should be overruled and that the Idaho State Police (ISP) Standard Operating Procedures (SOPs) for breath testing are void because they were not adopted in compliance with the rulemaking requirements of the Idaho Administrative Procedures Act (IAPA). (Id.) Notably, Svelmoe does not argue that that there was anything wrong with the breath test performed by Officer Tetrault; rather his argument is solely that the administrative procedures employed by ISP in adopting the SOPs were deficient.

After Svelmoe filed his opening brief, the Idaho Supreme Court held in State v. Haynes, ___ Idaho ___, 355 P.3d 1266, 1273-1275 (2015), that the 2013 SOPs were effectively agency "rules," but that those "rules" were void because ISP failed to adopt them in substantial compliance with the rulemaking requirements of the IAPA. Accord State v. Riendeau, ___, Idaho ___, 355 P.3d 1282, 1285 (2015). Notwithstanding this authority, the state submits the district court's order denying Svelmoe's motion to exclude the breath test results on the basis that the 2013 SOPs were void must be affirmed. Because, as the

Supreme Court held in Haynes, ISP's creation of the SOPs was an agency action governed by the requirements of the IAPA, Svelmoe's exclusive means for challenging such action was through the judicial review provisions of the IAPA; he had no standing to raise, and neither the lower courts nor this Court have jurisdiction to consider, a challenge to the validity of the SOPs as a basis for excluding breath test results in a criminal case.[4]

Even if Svelmoe's challenge is not jurisdictionally barred and the 2013 SOPs are void, reversal is not required. Because the state could still lay foundation for the breath test results through expert testimony at trial, Svelmoe failed to show in his motion in limine that exclusion of the breath test results was required.

B. Standard Of Review

Whether a court has subject matter jurisdiction is a question of law, given free review. State v. Kavajecz, 139 Idaho 482, 483, 80 P.3d 1083, 1084 (2003).

"When a decision on a motion addressing the admissibility of evidence is challenged, [the appellate court] defer[s] to the trial court's findings of fact supported by substantial and competent evidence." Besaw, 155 Idaho at 140,

[4] Neither Haynes nor Reindeau addressed the jurisdictional issue. Although the state did not raise this argument to the trial court, it is nevertheless appropriately before this Court for the first time on appeal because a challenge to a court's subject matter jurisdiction may be raised at any time, including for the first time on appeal. State v. Armstrong, 146 Idaho 372, 374, 195 P.3d 731, 733 (Ct. App. 2008). Moreover, because "[a] question of jurisdiction is fundamental[,] it cannot be ignored when brought to [the appellate court's] attention and should be addressed prior to considering the merits of an appeal." State v. Kavajecz, 139 Idaho 482, 483, 80 P.3d 1083, 1084 (2003) (quotations and citation omitted).

306 P.3d at 225.

C. The District Court And The Appellate Courts Do Not Have Jurisdiction In This Criminal Case To Consider Svelmoe's Challenge To The Validity Of The 2013 SOPs

Svelmoe argues that ISP did not approve methods for breath testing in compliance with the IAPA and, as a result, the methods approved by ISP are without effect. (Appellant's brief, pp. 18-22.) The Idaho Supreme Court recently held as much in State v. Haynes and State v. Riendeau, supra. However, neither Haynes nor Riendeau addressed whether a defendant in a criminal case has standing to bring a challenge to the manner in which ISP approved BAC testing methods as a basis for excluding the breath test result in the criminal case. Because, for the reasons set forth below, the judicial review provisions of the IAPA provide the exclusive means by which to challenge the validity of ISP's action, neither this Court nor the lower court have jurisdiction to entertain Svelmoe's challenge.

"Actions by state agencies are not subject to judicial review unless expressly authorized by statute." Laughy v. Idaho Dept. of Transp., 149 Idaho 867, 870, 243 P.3d 1055, 1058 (2010) (citing I.R.C.P. 84(a)(1)); Johnson v. State, 153 Idaho 246, 250, 280 P.3d 749, 753 (2012) (same). Idaho Code § 67-5270 permits judicial review of final agency actions, including the failure of an agency to "issue a rule" or "to perform, any duty placed on it by law." See I.C. § 67-5201(3) (definition of "Agency action"); Laughy, 149 Idaho at 871, 243 P.3d at 1059 (summarizing "types of agency actions that could be reviewed by a court"). However, in order to be entitled to such review, the "person aggrieved by final

agency action" must comply with the procedural requirements of I.C. §§ 67-5271 through 67-5279. I.C. § 67-5270(2); BV Beverage Co., LLC v. State, 155 Idaho 624, 627, 315 P.3d 812, 815 (2013); Laughy, 149 Idaho at 870, 243 P.3d at 1058. Where, as here, the aggrieved person is challenging the validity of a rule, compliance with the procedural requirements necessary to obtain judicial review requires the person to, among other things: exhaust all available administrative remedies (I.C. § 67-5271), institute proceedings for review or declaratory judgment by filing a petition in the district court of the county in which the final agency action was taken or where the aggrieved person resides (I.C. § 67-5272(1)), file the petition within two years of the adoption of the rule being challenged (I.C. §§ 67-5231 and 67-5273), and make the agency a party to the action (I.C. § 67-5278). Svelmoe did not comply with any of these procedural requirements, nor could he ever have done so in the criminal case.

From the beginning of this case, Svelmoe has sought a judicial ruling invalidating the SOPs for BAC testing based on ISP's failure to have complied with the formal rulemaking requirements of the IAPA in approving the testing methods contained in the SOPs. But Svelmoe did not comply with the judicial review provisions of the IAPA. To the state's knowledge, he did not attempt to

pursue any available administrative remedies.[5] I.C. § 67-5271. Nor did he "institute" any "proceedings for review or declaratory judgment" by filing a timely petition in the district court of the appropriate county and naming ISP as a party to the action. I.C. §§ 67-5272, 67-5273, 67-5278. Instead, Svelmoe has attempted to have the SOPs invalidated as a basis for excluding his breath test result in the criminal case. Nothing in the IAPA or in any other statute, including I.C. § 18-8004, enables Svelmoe to challenge the validity of ISP's action in this forum and in this manner. Svelmoe's attempt to do so is, in his own words, nothing more than an attempt to make "an end-run around the requirements" of the IAPA. (Appellant's brief, p.18.)

Because there is no statute that authorizes Svelmoe to raise ISP's alleged noncompliance with the rulemaking requirements of the IAPA as a defense in the criminal case, Svelmoe lacked standing to bring the challenge and both the lower court and this Court are without jurisdiction to consider it. See Laughy, 149

[5] The state confesses that it is not aware of any specific administrative remedy by which Svelmoe could challenge the validity of ISP's adoption of the SOPs and methods for BAC testing contained therein. Although I.C. § 18-8002A(7) allows for an administrative hearing when a person's driver's license has been suspended as a result of failing a BAC test, failure of ISP to comply with the rulemaking requirements of the IAPA in approving the methods for BAC testing is not one of the grounds upon which the license suspension may be vacated. In addition, I.C. § 67-5278 appears to contemplate that the validity of an agency rule may be challenged in an action for declaratory judgment, without the necessity of exhausting administrative remedies. See also Asarco, Inc. v. State, 138 Idaho 719, 69 P.3d 139 (2003) (mining companies did not have to exhaust administrative remedies before seeking judicial review of validity of state agency's action in issuing a total maximum daily load limit without complying with rulemaking requirements of the IAPA).

Idaho at 870, 243 P.3d at 1058 ("Without an enabling statute, the district court lacks subject-matter jurisdiction" to review agency action.). Because the IAPA applies to ISP's actions in approving methods for breath testing, see Haynes, __ Idaho __, 355 P.3d at 1273-1275, it also applies to bar Svelmoe's attempt to challenge those actions in this criminal case.

D. Even If The 2013 SOPs Are Void, Svelmoe Has Failed To Show The District Court Erred In Denying His Motion In Limine To Exclude His Breath Test Results At Trial

Even if the 2013 SOPs were void, the district court did not abuse its discretion when it denied Svelmoe's motion in limine to exclude his breath test results at trial. On appeal, Svelmoe argues, "The District Court erred in not granting the defendant's motion in limine to exclude the breath testing." (Appellant's brief, p. 14.[6]) Svelmoe's motion in limine, and appeal, only argued the state could not show the breath test was administered in conformity with applicable test procedures because the test procedures were void. (See Appellant's brief, pp. 14-22; R., pp. 200-214.) However, there are two ways the state can lay foundation to introduce the breath test results. See Haynes, __ Idaho __, 355 P.3d at 1275 (citing Dachlet v. State, 136 Idaho 752, 757, 40 P.3d 110, 115 (2002)). The state can either show that the test was administered in conformity with applicable test procedures or expert testimony may suffice to

[6] At trial, Svelmoe objected to the introduction of the breath test and the district court overruled those objections. (2/17/15 Tr., p. 144, L. 13 – p. 146, L. 10, p. 147, Ls. 3-14.) However, on appeal Svelmoe does not challenge the district court's trial ruling, but instead only challenges the district court's pre-trial motion in limine ruling. (See Appellant's brief, pp. 14-22.)

establish an adequate foundation. See Id. (citing Dachlet, 136 Idaho at 757, 40 P.3d at 115.

In Haynes, the Idaho Supreme Court determined that, even if the ISP SOPs were invalid, the district court did not err in denying the motion in limine because it was possible for the state to lay foundation for the admission of the breath test results through the use of expert testimony. Id.

> Therefore, the fact that the 2013 SOPs are void would not have prevented the State from establishing an adequate foundation for the admissibility of the test results. As stated above, the magistrate court ruled that the State would have to establish that the test was accurate. That could be done by expert testimony. Because Ms. Haynes pled guilty prior to trial, the magistrate court never had to determine whether the State could present sufficient evidence to establish that foundation. The district court did not err in holding that the magistrate did not err in denying the motion in limine.

Id.; accord Riendeau, __ Idaho __, 355 P.3d at 1285.

In this case, Svelmoe went to trial and, at that trial, the state laid foundation for the admission of Svelmoe's breath test results through the testimony of Officer Tetrault. (2/17/15 Tr., p. 128, L. 10 – p. 148, L. 3; Exs. 2, 3, 4.) On appeal Svelmoe does not challenge the district court's trial ruling that admitted the breath test results over his foundation objections, but instead only challenges the district court's pre-trial motion in limine ruling. (See Appellant's brief, pp. 14-22.) Idaho appellate courts will not consider an issue not supported by argument and authority in the opening brief. See Liponis v. Bach, 149 Idaho 372, 374, 234 P.3d 696, 698 (2010); (citing Jorgensen v. Coppedge, 145 Idaho 524, 528, 181 P.3d 450, 454 (2008); I.A.R. 35(a)(6).) The only issue before this

court is whether the district court erred in denying the motion in limine. The holding in Haynes dictates that it did not.

III.
The District Court Did Not Err When It Denied Svelmoe's Motion To Suppress The Results Of His Breath Test

A. Introduction

Svelmoe argues the district court should have suppressed evidence of his breath test because his consent to the test was not voluntary. (Appellant's brief, pp. 23-27.) Svelmoe claims that when a defendant is advised of the ALS suspension any subsequent consent is involuntary. (Id.) Svelmoe's argument is foreclosed by the Idaho Supreme Court's opinion in Haynes, which held that requesting a breath test "was not an unreasonable search" and therefore consent, as an exception to the warrant requirement, does not apply. See Haynes, __ Idaho __, 355 P.3d at 1275

B. Standard Of Review

The standard of review of a suppression motion is bifurcated. When a decision on a motion to suppress is challenged, the appellate court accepts the trial court's findings of fact that are supported by substantial evidence, but freely reviews the application of constitutional principles to those facts. State v. Klingler, 143 Idaho 494, 496, 148 P.3d 1240, 1242 (2006).

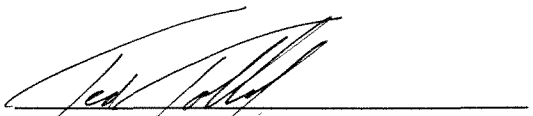
C. Reading The ALS Form Before Requesting A Breath Test Did Not Violate Svelmoe's Constitutional Rights

Svelmoe argues that advising a defendant of the ALS penalties vitiates any consent they may give to the breath test. (Appellant's brief, pp. 23-27.) Consent is an exception to the warrant requirement. See Haynes, __ Idaho __, 355 P.3d at 1275-1276. In Haynes, the Idaho Supreme Court held that where the officer had reasonable grounds to suspect a person was operating a motor vehicle under the influence of alcohol, a breath test "was not an unreasonable search" and therefore consent, as an exception to the warrant requirement, does not apply. Id.; see also Riendeau, ___, Idaho ___, 355 P.3d at 1285. Here, Svelmoe admitted that he had been drinking. (2/11/15 Tr., p. 25, Ls. 12-23; R., pp. 10-11.) In an encounter earlier in the day, before he was pulled over, Officer Tetrault told Svelmoe not to drive. (Id.) Officer Tetrault observed Svelmoe had the odor of an alcohol beverage emitting from his person, bloodshot eyes and slack appearance. (2/11/15 Tr., p. 25, Ls. 12-23.) Svelmoe failed the HGN test and the walk-and-turn test but successfully completed the one-leg stand. (2/11/15 Tr., p. 26, Ls. 2-17.) Officer Tetrault had reasonable grounds to believe Svelmoe was operating the motor vehicle while he was under the influence of alcohol. Therefore, requesting Svelmoe perform a breath test was not an unreasonable search, and no exception to the warrant requirement is required.

CONCLUSION

The state respectfully requests this Court to affirm the district court's judgment.

DATED this 29th day of October, 2015.



TED S. TOLLEFSON
Deputy Attorney General

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 29th day of October, 2015, I caused two true and correct copies of the foregoing BRIEF OF RESPONDENT to be placed in the United States mail, postage prepaid, addressed to:

JAY W. LOGSDON
DEPUTY PUBLIC DEFENDER
400 NORTHWEST BLVD.
P. O. BOX 9000
COEUR D'ALENE, ID 83816

TED S. TOLLEFSON
Deputy Attorney General

TST/dd